

The Honorable Lauren King

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

GABRIEL MARQUEZ VARGAS,

Plaintiff,

v.

RRA CP OPPORTUNITY TRUST  
1, REAL TIME RESOLUTIONS,  
INC., and NORTH STAR  
TRUSTEE, LLC,

Defendants.

Case No. 2:22-cv-01440-LK

PLAINTIFF'S REPLY TO DEFENDANTS'  
RESPONSE TO PLAINTIFF'S MOTION TO  
CERTIFY ISSUES TO THE WASHINGTON  
SUPREME COURT

NOTING DATE: MARCH 17, 2023

Defendants Real Time Resolutions ("RTR") and RRA CP Opportunity Trust 1 ("RRA") concede that "Washington courts have never commented on the negotiability of a debt as a pre-requisite to non-judicial foreclosure." Dkt. 57, p. 7, line 5. For precisely this reason, this case merits certification to the Supreme Court of Washington because no prior case squarely addresses negotiability as a prerequisite to the exercise of the power of non-judicial sale granted by the Deeds of Trust Act at Chapter 61.24 RCW and the accrual of the statute of limitations in the absence of negotiability.

RTR and RRA tacitly acknowledge they have a problem by now threatening to file a judicial foreclosure action to moot the motion to certify. However, filing a motion

1 for judicial foreclosure would not the moot consumer protection claims and the request  
 2 declaratory and injunctive relief against RTR, RRA, and North Star Trustee, LLC for  
 3 initiating the non-judicial foreclosure action and issuing a notice of trustee's sale.

4 Defendants' characterization of this home equity line of credit case as opening  
 5 the flood gates to require an inquiry into negotiability prior to every non-judicial  
 6 foreclosure and harm consumers looking for credit is hyperbole. Dkt. 57, p. 9, lines 17  
 7 - 25. It is not unreasonable to assume that lenders and their successors already  
 8 analyze these legal questions prior to choosing their remedy. Here, the Plaintiff is  
 9 merely asking the Court to certify the question of whether the contracts the lenders  
 10 drafted and executed, providing for open-ended credit privileges, must be foreclosed  
 11 judicially.

12 The Defendants appear to believe that the Deeds of Trust Act confers the right  
 13 to non-judicially foreclose all deeds of trust, but on the other hand acknowledge that  
 14 agricultural land is excluded. Dkt. No. 57, p. 6, lines 4-7. As a starting proposition, the  
 15 line of credit contract at issue here is secured by a "Deed of Trust (Line of Credit Trust  
 16 Deed)." Dkt. 42, ¶ 28. The words of the contracts matter, especially when they make  
 17 clear that the contracts provide a line of credit rather than a mortgage.

18 Washington law provides two alternative means to foreclose real property  
 19 securing a loan contract: (1) non-judicially through Chapter 61.24 RCW, and (2)  
 20 judicially through Chapter 61.12 RCW. While non-judicial foreclosure provides lenders  
 21 an efficient remedy to recover, they "must strictly comply with the statutes and courts  
 22 must strictly construe the statutes in the borrower's favor" because "the act dispenses  
 23 with many protections commonly enjoyed by borrowers under judicial foreclosures."  
 24 *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 567 (2012). Thus, the  
 25 Deeds of Trust confers a privilege, not a right to foreclose nonjudicially. Rather than  
 26 "stretch" the interpretation of the word "beneficiary" as the Defendants assert at Docket

57, p. 9, line 17, black letter law compels us to strictly interpret the meaning of “holder” because the Deeds of Trust Act defines the beneficiary as the “holder” of a negotiable instrument.

Defendants insist that the Supreme Court held that the holder of a reverse mortgage could foreclose, which they claim supports their argument. *OneWest Bank, FSB v. Erickson*, 367 P.3d 1063, 1078 (2016). Firstly, *OneWest* involved a judicial foreclosure, not a nonjudicial foreclosure. To the extent that *OneWest* stands for the proposition that a non-negotiable instrument must be foreclosed judicially, then RTR and RRA violated the law by initiating non-judicial foreclosure proceedings against Mr. Marquez.

In any event, negotiability did not determine the outcome in *OneWest*. The Supreme Court in *OneWest* limited its review to the three defenses asserted by the borrower: (1) *OneWest* did not constitute a bona fide mortgagee; (2) the Idaho conservator lacked the legal authority to encumber Washington real property; and (3) *OneWest* did not hold the promissory note and the deed of trust was not properly acknowledged. *OneWest*, 367 P.3d at 1067. The Court did not review negotiability.

The Washington Supreme Court did not hold that *OneWest* was the holder so much as accept the factual findings of the trial court. *Id.* The courts agree that *OneWest* turned on the law of full faith and credit. *Chan Healthcare Grp. PS v. Liberty Mut. Fire Ins. Co.*, 1 Wn. App. 2d 529, 535 (2017). To the extent that *OneWest* “applied Article III of the U.C.C. to reverse mortgage notes, it did not address negotiability.” *Bennett v. CIT Bank, N.A.*, 544 F. Supp. 3d 1225, 1230 (2021) (internal citations omitted). This case will be the first opportunity the Washington State Supreme Court has had to address whether negotiability constitutes a prerequisite to the exercise of the power of sale conferred under the Deeds of Trust Act.

The Defendants concede that this HELOC is a different legal animal because

1 they agree with Plaintiffs that acceleration does not control the triggering of the statute  
2 of limitations because the termination of a HELOC account renders “the outstanding  
3 balance...’payable in full at the time of such termination.” Dkt. 57, p. 2, lines 22 - 25.  
4 Indeed, Mr. Marquez opened the HELOC account in December of 2005 and defaulted  
5 on February 18, 2011, at or near the end of the initial draw period. Shortly thereafter,  
6 the servicer of the loan changed. Dkt. 57, p. 8, lines 9 - 15. Indeed, the Defendants  
7 assume that the HELOC provided the borrower two five-year draw periods. Dkt. 57, p.  
8 2, lines 21-22. RRA purportedly purchased the defaulted HELOC from the Bank of  
9 New York Mellon on April 22, 2016, well after the two initial five-year draw periods. If  
10 RRA had purchased the HELOC during the draw periods, it would have been  
11 contractually obligated to make draws available.

12 In an ironic twist, the Defendants call attention to an external document referred  
13 to as “Important Terms of Our Home Equity Line of Credit” in support of the proposition  
14 that the Marquez HELOC constitutes a negotiable installment loan. However, a  
15 negotiable instrument signed in blank cannot rely on external documents to render a  
16 promise unconditional. *Nicholls v. Robertson*, No. 83347-2-I, slip. op at 10 (Wash. Ct.  
17 App. March 13, 2023) (published in part). (A negotiable instrument is an unconditional  
18 promise or order to pay a fixed amount of money, with or without interest...Negotiability  
19 exists and is determined from the face, the four corners, of the instrument at the time it  
20 is issued without reference to extrinsic facts (internal citations omitted)). If a promise  
21 cannot be rendered unconditional by relying on writings beyond the four corners of the  
22 contract, the defendants cannot rely on external writings to render the HELOC into an  
23 installment note with a term certain.

24 Lastly, while Plaintiffs agree with Defendants that federal regulations do not  
25 control the Washington statute of limitations applicable to a HELOC, the federal  
26 definition of an open-ended line of credit prevents the Marquez HELOC from being

1 considered an installment loan (Dkt, 57, p. 11, lines 7-9). Thus, certification seems  
2 especially appropriate for the Washington State Supreme Court to define what  
3 constitutes an installment loan.

4 In conclusion, the certified questions provide a perfect opportunity for the  
5 Supreme Court of Washington to squarely address the question of whether  
6 negotiability constitutes a prerequisite to the exercise of the power of sale under the  
7 Deeds of Trust Act and to determine the interplay between federal regulations defining  
8 an open-ended credit line, the definition of an installment note, and the accrual of the  
9 statute of limitations.

10  
11 Respectfully submitted this 12th day of March 2023.

12 We certify that this memorandum contains 1,220 words, excluding signature  
13 blocks, captions, and certificate of service, in compliance with the Local Civil Rules.

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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that I caused the foregoing Reply to be served by electronic service: Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed below who are registered with the Court's EC/ECF system:

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DATED this 12th day of March 2023.

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